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In The

Supreme Court of the United States

October Term, 1994

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation; ROBERT V. BAKER; JAMES E. RICH; D. BRUCE MORGAN; and WASHINGTON ALTERNATIVE LIVESTOCK ASSOCIATION, a Washington corporation,

Petitioners,

v.

CURT SMITCH, Director of Washington Department of Wildlife; DEAN A. LYDIG, JAMES M. WALTON, MITCH JOHNSON, TERRY KARRO, JOHN McGLENN, NORMAN F. RICHARDSON, Commissioners of the Washington State Wildlife Commission; and the WASHINGTON STATE DEPARTMENT OF WILDLIFE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Supreme Court

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF ON BEHALF OF NORTH AMERICAN ELK BREEDERS ASSOCIATION, IDAHO VENISON COUNCIL, COLORADO ELK AND GAME BREEDERS ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION AND NORTHWEST LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The North American Elk Breeders Association (NAEBA), Idaho Venison Council (IVC), Colorado Elk and Game Breeders Association (CEGBA), National Cattlemen's Association (NCA) and Northwest Legal Foundation (NLF) respectfully petition the court to file the annexed amici curiae brief. Petitioners have consented to the filing of this brief, while Respondents have not consented.

As with all fundamental rights, violation of one person's rights decreases the rights of everyone. The NLF believes deer and elk farmers have the right to safely conduct their business and that the Commerce Clause's function of promoting interstate commerce has been violated by the Washington Department of Wildlife. The effect of upholding the propagation and import bans on elk and deer breeders here is not just the economic protectionism that is found in other cases, but a method of selecting for elimination specific economic endeavors that may not be socially acceptable.

For the foregoing reason the NAEBA, IVC, CEGBA, NCA and NLF request that this motion for leave to file the annexed amici curiae brief be granted.

DATED: July 28, 1994

Respectfully submitted,

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I. STATEMENT OF INTERESTS

The North American Elk Breeders Association (NAEBA) is a non-profit organization dedicated to the promotion and growth of the domestic elk industry in North America as an alternative form of livestock production. Most of its members are farmers and ranchers who raise cattle and sheep. NAEBA currently has 582 members in good standing in 35 states, 5 provinces and 5 countries. NAEBA members currently own 12,000 of the 20,000 elk presently raised in the United States. Each year, members of NAEBA sell millions of dollars worth of their animals in interstate commerce. More than 80% of the sales are interstate sales. (For example, one Montana game farm operator recently purchased over $1,200,000 worth of animals from Missouri.) NAEBA's role is to serve the industry as its spokesman, representing its members in matters of mutual concern in order to further the development and growth of this alternative livestock industry.

The economic value of the elk industry alone is substantial, and is growing each year. Live animals in the United States alone have a value of over $80,000,000. Fences, handling facilities and land on which these animals are raised account for an additional $70,000,000.

Live elk sales in the United States in 1992 amounted to $24,000,000, representing the sale of over 6,000 head of which 80%, or approximately $20,000,000, are from interstate sales. In addition, sales of animal byproducts and meat accounted for another $1,000,000 of sales, 95% of which occurred in interstate commerce.

While NAEBA members must raise elk to qualify for membership, many of its members also raise other

"exotic" species, such as deer, bison, yak, llamas, etc. In addition to the 20,000 elk throughout the United States, there exist approximately 120,000 bison, approximately 7,000 red deer, and approximately 28,000 fallow deer.

The NAEBA has participated in a similar case involving an attempted ban on the private ownership and importation of big game animals in Wyoming. *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992).

The Idaho Venison Council (IVC), with 21 members, represents the majority of deer and elk producers in Idaho. IVC producers currently farm deer and elk primarily as breeders and for velvet antler. They have worked with the Idaho Legislature to put regulation of their industry under the jurisdiction of the Idaho Department of Agriculture. IVC members may be affected by the precedent set in this case.

The Colorado Elk and Game Breeders Association (CEGBA) has over 75 members. The association and its members are satisfied with the current Colorado requirements on their industry. They are concerned that bans in other states may be used to establish a ban on their livelihood in Colorado.

The National Cattlemen's Association (NCA) is a non-profit trade association that speaks for 230,000 cattlemen and others from all segments of the beef cattle industry. It is affiliated with 46 state cattle associations and 29 national beef breed organizations. NCA's mission is to advance the economic, political, and social interests of the U.S. cattle industry, and works to create a positive business environment while providing consumers with a safe and wholesome product.

The Northwest Legal Foundation (NLF) is a non-profit public interest law firm. It is dedicated to protecting constitutional rights associated with the ownership and use of private property. The NLF believes that in the United States property rights are fundamental and are the underpinnings for our other individual freedoms and economic success.

The interests of the NAEBA, IVC, CEGBA and NCA in the outcome of this lawsuit are directly tied to the welfare of their members nationwide. The NLF's interest is in protection of individual rights throughout the United States. If the decision of the Ninth Circuit is allowed to stand, no livestock producer or other business owner can feel secure. The same rationale could and might be used to ban cattle, sheep, bison, llama, yak and any other conventional or alternative livestock, or other types of business operations, in any state in the nation.

II. SUMMARY OF ARGUMENT

Balancing local interests with the duty of Congress to prevent barriers against interstate trade is required in any Commerce Clause decision. *Maine v. Taylor*, 106 S.Ct. 2440, 2447, 477 U.S. 131, 91 L.Ed.2d 110 (1986). Here, the balancing is a shot in the dark, because a trial on the factual disputes was not held. The facts presented by appellants lead to the conclusion that they could prevail at the trial level if those facts are proven with the evidence that would be gathered and presented at such trial.

The Commerce Clause has been violated. The commerce ban here is clearly excessive in relation to the local interest.

III. REASONS FOR GRANTING THE WRIT

A. The Ninth and Tenth Circuits have issued conflicting decisions.

Both the Ninth and Tenth Circuits principally based their decisions on *Pike v. Bruce Church, Inc.*, 90 S.Ct. 844, 847, 397 U.S. 137, 25 L.Ed.2d 174 (1970). The different interpretations by each court led to different results, even though the issues and subject matter were nearly the same. Plaintiffs in both cases were elk or deer farmers faced with a ban on importation and breeding of their stock.

The statement in *Pike* quoted in both Courts provides:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142 (internal citations omitted).

In *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), the court found that inquiries into the extent of the burden on commerce and whether lesser impact regulations would suffice were essential to fulfill the *Pike* test. 957 F.2d at 763.

In this case, the Ninth Circuit found that unless the appellants could prove their alternatives could *eliminate* risk, no balancing would be done and the regulation would be valid. The court reached this result despite other findings that:

> . . . [A]t some point the risks presented by proposed alternatives as compared to challenged regulations would be so small that courts should not give them credence. PNVP has arguably offered evidence that could support a finding that its proposed alternatives would reduce the risks to that point.

Petition for Writ of Certiorari (Petition), App. 20.

B. A factual record is needed in this case, but summary judgment affidavits are all that is available.

The District Court found the interest of the Washington Department of Wildlife in preventing disease in wildlife was "legitimate". Petition, App. 36. It apparently accepted the arguments of the Department below that an elk or deer brought into Washington *may* have a disease, that disease in that particular animal *might* not be detected by the Washington State Veterinarian, the diseased animal or one infected by it *might* escape, the escaped animal *might* infect a wild elk or deer, and this would lead to "catastophic consequences." However, no citation was given for the claim of catastrophic consequences.

Risk factors are often hard to determine even with a full factual record. Here, the record allows for no calculation of risk factors. This court has not approved summary judgments that rest on credibility determinations.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2513, 477 U.S. 242, 255, 91 L.Ed.2d 202 (1986).

Here, the District Court weighed the credibility of expert affidavits. It was found that because the experts admitted the tests for animal disease were not 100% accurate on an individual animal, the tests were not a viable alternative, despite the same expert's testimony that such tests were effective. Donald Davis Declaration, ER 209. The Court reached this result despite the fact that such tests are the same as those used for cattle and for humans! *Id.*

Neither the petitioners' nor respondents' experts were subject to cross-examination. Yet cross-examination is the best method yet devised for testing trustworthiness of testimony. *Sartor v. Arkansas Natural Gas Corp.*, 64 S.Ct. 724, 729, 321 U.S. 620 (1944).

Here, the respondents' experts were believed despite (1) the District Court discovery that respondents' testimony about disease in a Washington herd and another disease occurrence in Montana were *false* (Petition, App.

29); and (2) the rule that the evidence of the petitioners (the non-moving parties) is to be believed, and all justifiable inferences are to be drawn in their favor.

Here, it is unclear whether the District Court required petitioners to file a summary judgment motion in an effort to make weighing the evidence more appropriate. However, as this Court has held, weighing the evidence is not appropriate on any summary judgment motion.

C. The state's regulations violate the Commerce Clause.

A citizen's ability to participate in the economy is a privilege guaranteed by the United States Constitution. *Sugarman v. Dougall,* 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting, citing *Crutcher v. Kentucky,* 141 U.S. 47, 57 (1891)). The Commerce Clause plays an important role in protecting the free flow of interstate trade. *Maine v. Taylor, supra.*

Here, the regulations at issue not only block interstate commerce, they prohibit the legitimate farming of animals. (Petition, App. 46). The state's claimed local interest is protection of wildlife from disease and interracial commingling. This interest must not be irrational, or it would be arbitrary and capricious.

The local interest here is not public health, but animal health. In a case where human health was the issue, rational risks are still necessary, or regulations could "close every business in this nation". *Industrial Union v. American Petroleum,* 100 S.Ct. 2844, 2882, 448 U.S. 681, 65 L.Ed.2d 1010 (1980) (Rehnquist, J., concurring).

In *Industrial Union,* the issue was whether reducing the level of benzene exposure limits from 10 parts per million (ppm) to 1 ppm, by the Occupational Safety and Health Administration (OSHA) was based on substantial evidence. This Court found OSHA must show that a toxic substance poses a "significant health risk" as a threshold question, before creating new standards. *Industrial Union,* 100 S.Ct. at 2850.

While there is not plain legislative criteria that the risk to animals must be "significant" before regulations are adopted, there are two reasons why such a requirement is necessary in this case. First, the statute authorizing the regulation, RCW 77.12.040, only allows the Department of Wildlife to regulate "deleterious" exotic wildlife. (Petition, App. 46). "Deleterious" to wildlife, like "material" impairment to health of humans in *Industrial Union,* must be considerably more dangerous than risk free. This Court has found "safe" is not the equivalent of "risk free".

> There are many activities we engage in every day – such as driving a car or even breathing city air – that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe".

Industrial Union, 100 S.Ct. at 2864.

Second, the burden on interstate commerce must be outweighed by the local interests, or the Constitution is violated. The Commerce Clause is violated if the burdens on interstate trade are clearly excessive in relation to local benefits. *Pike v. Bruce Church, supra.* That balancing requires a weighing of both the burdens and the local

benefits. As characterized above in Section B, the Department's claims of hunches and potential maybes do not produce substantial evidence of a significant risk. Therefore, the local benefit is minimal or non-existent.

The effects on interstate commerce were not thoroughly determined below, but thousands of animals and thousands of millions of dollars are being affected. Declaration of James E. Rich, ER 372-410.

Petitioners contend that testing for disease by the State Veterinarian, as was done before the ban, is a viable means to control disease. The District Court found these tests ineffective (through summary judgment) even though expert affidavits claimed 80-85% accuracy on a particular animal. ER 162, ER 236. The District Court's finding was based on dicta in *Maine v. Taylor, supra.*

The issue in *Maine* was an import ban on baitfish. Tests on these fish were found wanting because of the "small size of baitfish and the large quantities in which they are shipped." *Maine,* 106 S.Ct. at 2449. Here, the animals are large and each tested individually. One of the many adequate and available alternatives which would address the state's concerns would be a requirement that a positive test result in one animal trigger rechecks of the entire herd.

Even without a voluminous record, it is clear the situation here is very different than that in *Maine.* Here the risks of importing disease (let alone escape and infection of wild animals) are reduced to practically nothing. Expert affidavits explained how other states have effectively protected wildlife without banning the industry. ER 209, ER 347-362 & ER 449. Even though elk and deer

have been imported and farmed in Washington state for years prior to the ban, Washington is disease free. (Petition, p. 9).

IV. CONCLUSION

The record in this case does not lend itself to the balancing of interests required in Commerce Clause cases. While the Department of Wildlife claims, through some affidavits, that there might be a risk to wildlife from deer and elk farming, the Department has not produced substantial evidence that the risk is so great that interstate commerce must be halted and an industry closed. As stated in *Industrial Union*, 100 S.Ct. at 2875, "Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible." This Court should accept certiorari to enable petitioners to argue the merits of their appeal.

DATED: July 28, 1994

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